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No._____

In The

Supreme Court of the United States

October Term, 1990

GREENSPAN, JAFFE & ROSENBLATT,
LEON J. GREENSPAN, PAUL D. JAFFE
and VICTOR E. ROSENBLATT,

Petitioners,

v.

SARA LEE CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the due process clause of the Fifth Amendment and Article III of the United States Constitution, the imposition of sanctions under Rule 37 of the Federal Rules of Civil Procedure upon counsel and client jointly and severally may be directed by a Magistrate and ordered by the District Court without warning and a hearing to allocate fault between counsel and client as well as between an individual attorney and the law firm.

2. Whether, under the due process clause of the Fifth Amendment and Article III of the United States Constitution, a Magistrate purporting to act under authority of the Magistrate's Act (28 U.S.C. Sec. 636) may issue coercive orders in the nature of injunction and sanctions in the nature of contempt when purporting to hear and determine discovery issues where there has been no failure to comply with the order of the District Court, but only a claimed failure to comply with the order of the Magistrate.

3. Whether, under the due process clause of the Fifth Amendment and Article III of the United States Constitution, in the light of ethical constraints imposed upon counsel by Canons 7 and 4 of the Code of Professional Responsibility, sanctions may be imposed upon counsel and client under Rule 37 of the Federal Rules of Civil Procedure without warning so as to enable the client to retain new counsel so that present counsel may defend himself without violation of the Code of Professional Responsibility.

PARTIES

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows: THOMAS E. HOAR, INC., Plaintiff; SARA LEE CORP., Defendant- Appellee; GREENSPAN, JAFFE & ROSENBLATT, LEON J. GREENSPAN, PAUL D. JAFFE and VICTOR E. ROSENBLATT, Appellants.

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In The

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit, are officially reported as *Thomas E. Hoar, Inc. v. Sara Lee Corporation*, 882 F2d 682 (2nd Cir. 1989) (hereinafter referred to as Hoar-I) which appears in Appendix A hereto at 1a and *Thomas E. Hoar, Inc. v. Sara Lee Corporation*, 900 F2d 522 (2nd Cir. 1990)

(hereinafter referred to as Hoar-II) which appears in Appendix B hereto at 14a.

JURISDICTION

The jurisdiction of the United States Court of Appeals for the Second Circuit to hear the appeal first in Hoar-I and then in Hoar-II is based upon authority granted under 28 U.S.C. 1291, the doctrine of pendant appellate jurisdiction and the exception to the so called "final judgment rule" set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 US 541, 546 (1948) as well as in the doctrine enunciated by the Second Circuit in *Cheng v. GAF Corp.*, 713 F2d 886 (2nd Cir. 1983) wherein the Circuit Court held that a non-party attorney may bring an interlocutory appeal of a Rule 37 sanction pursuant to the *Cohen* exception. In Hoar-I, the Second Circuit expressly found that the appeal by counsel satisfied the jurisdictional requirements and the issue was not raised in Hoar-II.

The jurisdiction of this Court in invoked as follows:

1. Hoar-I was decided on August 10, 1989. An application for re-hearing en banc was filed on August 23, 1989 and thereafter denied on September 21, 1989. (Appendix C at 28a)

2. Hoar-II was decided on April 2, 1990. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. 1254(1).

As required by Rule 29.4(c) of this Court, Petitioners state that 28 U.S.C. Sec. 2403(b) may be applicable because this proceeding draws into question the Constitutionality of the procedure employed by the Federal Courts in their use of Magistrates pursuant to Rule 37 of the Federal Rules of Civil Procedure as limited by 28 U.S.C. 636 in the light of the due process clause and Article III of the United States Constitution.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

A. Constitutional Provisions

Article III - Appendix D at 30a
Fifth Amendment - Appendix E at 31a

B. Statutory Provisions

28 U.S.C. 636 - Appendix F at 32a

C. Rule Provisions

FRCP 11 - Appendix G at 39a
FRCP 37 - Appendix H at 40a

STATEMENT OF THE CASE

Inherent in the resolution of discovery problems is the role of the Magistrate who operates under statutory authority (28 U.S.C. 636). Clearly, a Magistrate is not an Article III Judge and possesses no powers not authorized by statute nor authority not transmitted from the District Court Judge. The Magistrate can neither violate the express plain English mandate of the statute, nor purport to wield authority by the exercise of statutory powers vested in him which violate due process rights granted by the Fifth Amendment, nor can he usurp District Court powers in violation of Article III.

Magistrates, acting upon a reference from the District Court pursuant to 28 U.S.C. 636 now purport to render determinations on discovery issues. The Magistrates have assumed that they have the power to issue orders, in the nature of a mandate or injunction, directing compliance with discovery demands upon penalty of paying sanctions for violation of their orders.

The imposition of a sanction, by definition, is in the nature of a finding of contempt. Clearly, by any plain English construction of

the Magistrate's Act (28 U.S.C. 636) and the discovery sanction rule (FRCP 37) a Magistrate has no authority to mandate or order a party or counsel to comply with his ruling or mandate. Further, a Magistrate has no authority to hear and determine contempt, or to issue rulings which in effect are the equivalent of a contempt adjudication. A Magistrate may only hear and recommend, not hear and determine. It follows, therefore, that only when a party or counsel has been accused of violating a District Court order, can the accusation be referred to the Magistrate to hear and recommend whether the violation took place, and to hear and recommend the appropriate sanction for such violation, including the allocation of responsibility, after a warning that joint and several liability is under consideration. The Magistrate may only hear and recommend but cannot determine such issues referred to him by the District Court Judge.

Significantly, neither the Magistrate nor the District Court ever undertook to hear or determine where the fault lay in this case. Was it the client's fault or counsel's fault that there was a perceived failure to appropriately comply with discovery requests? That being the issue, the relationship between Rules 11 and 37 of the Federal Rules of Civil Procedure comes prominently into play.

Rule 11 is focused primarily upon counsel who is primarily liable for any violation of the Rule. The client is only secondarily liable if he is at fault along with counsel. Rule 37 is focused primarily upon the client who is primarily liable and only secondarily upon the lawyer advising him if the lawyer is at fault along with the client. It follows that before the Court may impose sanctions on a client in a Rule 11 case, or on counsel in a Rule 37 case, there must be a hearing to determine whether the party secondarily liable is at fault along with the primarily liable party. Failure to provide, first, a warning to the secondarily liable party, and then for a hearing and

allocation of responsibility, is a clear deprivation of the due process rights of the secondarily liable party under the Fifth Amendment. If the order for sanctions is that of the Magistrate, it violates both Article III of the Constitution and 28 U.S.C. 636.

A very significant issue raised by this case is the relationship between counsel and client with regard to the general responsibility for providing discovery and for failure to provide discovery in conformity with the rulings of a Magistrate or District Court. This issue underlies the inherent conflict of interest between counsel and client which arises when there is a discovery dispute calling for Rule 37 sanctions. The duty that the attorney owes to the client as set forth in the Code of Professional Responsibility now comes forcefully into play. Canon 7 of the Code requires the lawyer to represent his client zealously within the bounds of the law, while at the same time, Canon 4 requires the lawyer to preserve the confidences and secrets of the client. Accordingly, when faced with a perceived inability to provide documents or answers to interrogatories sufficient to satisfy a Magistrate or District Court, counsel is faced with a real and most terrible conflict of interest. This threat is most frightening where a warning is given that joint and several liability is under consideration.

Does counsel continue to maintain that the discovery supplied by the client passes muster as required by Canon 7 or does the lawyer, in order to avoid the imposition of Rule 37 sanctions on himself, ignore Canon 4 and point the finger at his client as the culprit? Counsel cannot observe Canons 7 and 4 without exposing himself to what may be inappropriate and unwarranted sanctions under Rule 37. Counsel cannot defend himself if he is not first warned that sanctions are being considered. It is too late to do so after the ruling! If first warned, may he then defend himself at the hearing without violating the Code of Professional Responsibility? Once counsel is

warned, should the client obtain new counsel to represent him on the issue?

The resolution of these questions will have a significant impact upon every attorney representing every client in every United States District Court in every case involving the discovery process. Does every discovery problem require the lawyer, in order to protect himself from the wrath of the Magistrate or the wrath of the District or Circuit Court say to the Court, in words or substance, "I asked my client for the information but he did not supply it to me"? Does every request for discovery necessarily create the aura of an adversary relationship between the lawyer and his client in framing responses to requests for discovery? The Bench and Bar require the guidance of this Court.

A. Prior Proceedings.

Plaintiff, Thomas E. Hoar, Inc. ("Hoar") commenced this action in May, 1986 seeking, *inter alia*, damages arising from violation of the Sherman Act by the Hanes division of Defendant Sara Lee Corporation ("Hanes"). With the onset of discovery, so too came the onset of discovery disputes.

On September 2, 1988 the Magistrate (John Caden) rendered an order imposing joint and several liability on Hoar and its counsel, Greenspan, Jaffe & Rosenblatt ("GJR") for FRCP 37 sanctions in the form of expenses and attorneys' fees in the sum of $22,990.09 without ever giving a warning that joint and several liability was contemplated and without holding a hearing on the allocation of fault between client and counsel, and without the issuance of a prior Court order directing Hoar to comply with discovery requests. On October 12, 1988, the District Court (Thomas W. Platt), after appeal by Hoar and its counsel, approved the imposition of sanctions without comment on the joint and several liability of Hoar and its

counsel; but reduced the award to $14,815.40. On October 27, 1988, GJR requested clarification of Judge Platt's order on the issue of the joint and several liability of Hoar and its counsel.

On November 10, 1988, an appeal was filed to the United States Court of Appeals for the Second Circuit. Thereafter, on November 23, 1988, Judge Platt issued an order which affirmed the Magistrate, specifically on the issue of joint and several liability. Neither the Magistrate nor the District Court held any hearing to allocate all or a portion of the liability between Hoar and its counsel. The notice of appeal was amended to include the subsequent order and was filed on November 23, 1988. This was followed by a second amended notice of appeal on December 8, 1988 wherein GJR were named as Appellants.

After hearing argument on April 19, 1989, the United States Court of Appeals for the Second Circuit affirmed the District Court by its decision and order decided August 10, 1989 (Hoar-I). The Court rejected the due process argument raised by Hoar and its counsel, concluding:

> "The proceedings that led to the District Court's imposition of the sanction included several conferences before the Magistrate, which resulted in two Court orders, the hearing at which the Magistrate imposed the sanction, an appeal of the Magistrate's order, and a review of the matter by the District Court. In view of these proceedings, it stretches the imagination to argue that Appellants did not have notice of, or the opportunity to be heard about the sanction imposed. Accordingly, we find no deprivation of due process." *Id*, 882 F2d 682, 688.

Despite the self serving statement of the Court of Appeals, it failed to address the issue of the lack of a prior Court order to

comply, or the lack of a warning of the contemplation by the Magistrate of the imposition of sanctions on counsel, the secondarily liable party, or the lack of a hearing to allocate fault as between counsel and client. The decision neglected to state that neither the Magistrate nor the District Court had addressed these issues. Accordingly, the Magistrate, the District Court, and the Court of Appeals all approved the imposition of sanctions on a joint and several liability basis on counsel as well as client, without having the foggiest notion as to who was at fault. Each Court assumed that counsel was equally at fault with the client without any proof whatsoever that counsel had advised the client to withhold discovery or to disobey any discovery order. Even more egregiously, neither the Magistrate nor the District Court, let alone the Court of Appeals, were the slightest bit concerned with the fact that at no time was counsel ever warned that if sanctions were imposed, it would be on a joint and several liability basis, despite the fact that the clear focus of FRCP 37 is for the imposition of such sanctions, where warranted, primarily on the client, and only secondarily upon counsel, where justified, first, after a warning and second, after an allocation hearing.

Without any warning that the Magistrate was considering the imposition of sanctions on counsel as well as client, there was no way for counsel, in light of counsel's ethical obligations to client under Canons 7 and 4 of the Code of Professional Responsibility, to protect the law firm. Apparently, the Court of Appeals was under the impression that counsel had the obligation to anticipate the possibility of joint and several liability, without any prior warning to that effect, inform the client of the looming conflict of interest because of the possibility of joint and several liability so that the client could obtain separate counsel, and thereby enable counsel, despite the clear direction of Canons 7 and 4 of the Code of Professional Responsibility to become an adversary of the client. If

followed, the above procedure would be a clear violation of Fifth Amendment due process; and if approved, would wreak havoc in the Courts!

In October of 1988, while the appeal to the Second Circuit was pending in Hoar-I, Defendant made three more motions to Magistrate Caden seeking to compel discovery, despite the fact that most of the discovery requests were already before the Second Circuit. By order and memorandum dated November 29, 1988, Magistrate Caden precluded Hoar from offering certain evidence at trial; ordered that Hoar identify documents in support of its pass-through claim or be precluded from offering evidence at trial; directed answers to certain specified interrogatories or be precluded; directed answers to requests to admit or such request would be deemed admitted; denied Hoar's request for a protective order; and finally, ordered Hanes to submit a proposed order with an accounting of costs and attorneys' fees.

By order dated January 12, 1989 after appeal by Hoar and counsel, the District Court, for the first time, issued an order which mandated compliance with the Magistrate's November 29, 1988 order. Thereafter, supplemental responses were served and submitted to the District Court who referred the same to the Magistrate for review as to compliance. By his report and recommendation of March 16, 1989, the Magistrate recommended that Hoar be precluded from offering evidence at the trial; the request to admit be deemed admitted; and, without a prior warning, or a hearing on the allocation issue, recommended that Hoar and its counsel jointly and severally be liable for sanctions in the amount of $21,984.24.

Despite timely objections, by order dated August 29, 1989, the District Court "automatically" affirmed his Magistrate, rejecting the legal and factual arguments submitted by Hoar and counsel. Neither

the District Court nor his Magistrate held a hearing to determine fault or allocate liability as between client and counsel. Neither the District Court nor the Magistrate specifically warned counsel that the Magistrate was going to consider the imposition of joint and several liability.

On September 13, 1989 a notice of appeal was filed with the Second Circuit in Hoar-II on behalf of counsel as well as client. In the meantime, on August 21, 1989 a petition for re-hearing en banc was filed with the Second Circuit Court of Appeals in Hoar-I which was denied on September 21, 1989. However, the order of denial apparently was not made known to the Clerk of the Circuit Court. It was not made known to counsel for either party until December 11, 1989, or received by counsel for Hoar until December 15, 1989. No explanation was ever given.

By letter dated October 4, 1989, the State of New York Grievance Committee for the Ninth Judicial District notified counsel for Hoar that the Grievance Committee had authorized a *sua sponte* complaint. It was addressed to "Leon J. Greenspan, Esq., Greenspan, Jaffe & Rosenblatt, 180 East Post Road, White Plains, New York 10601". By letter dated October 12, 1989 counsel responded, individually and on behalf of GJR, the law firm. In so doing, the letter referred to the pendency of the application for re-hearing en banc in Hoar-I, since it was then believed to be pending. This erroneous belief was further compounded by communication with the office of the Clerk of the United States Court of Appeals for the Second Circuit, who, upon inquiry by GJR in late November, 1989, stated that the application was still pending and had not yet been decided.

The Clerk's office further stated that a motion for an addition to the petition for re-hearing en banc, containing the letter from the Grievance Committee, the GJR response, including exhibits, would

be of interest to the Circuit Court in resolving the re-hearing petition. Accordingly, GJR filed the motion, affidavits and exhibits on December 6, 1989. The motion was rejected and returned as moot, along with the copy of the September 21, 1989 order of the Second Circuit denying re-hearing en banc. Upon inquiry, counsel was informed that the Clerk's office had just recently become aware of the order of denial of re-hearing and was unaware of its existence until the receipt of the motion to add to the re-hearing petition, dated December 6, 1989. Under the circumstances, logistically, there was insufficient time to petition this Court for Certiorari on Hoar-I. However, it is respectfully submitted that the issues and arguments of Hoar-I are encompassed in Hoar-II so that the decision in Hoar-II would apply as well to and be dispositive of Hoar-I.

B. Statement of Facts

At issue in Hoar-II were three motions for which monetary sanctions of $21,984.24 were awarded to Defendant, based upon the undocumented affidavit of its counsel, Russell H. Carpenter. Opposition to those motions was solely on the issue of client compliance. Given the ethical restraints of the Code of Professional Responsibility, counsel never had the opportunity to be heard on the issues of the allocation of responsibility for the perceived noncompliance as between counsel and client. Therefore, the issue of joint and several liability was first raised by the Magistrate in his report and recommendation of March 16, 1989 but never imposed until the August 29, 1989 order of the District Court. Due to the constraints of the Code of Professional Responsibility, it was not until October 4, 1989, when GJR were served with the *sua sponte* complaint of the Ninth Judicial District Grievance Committee that counsel was given an appropriate forum or opportunity to defend their conduct which was done in their response of October 12, 1989 to the Grievance Committee.

At all times, GJR informed Hoar of its discovery obligations. This was done personally at conferences, by telephone, as well as in writing. Hoar was supplied with copies of document requests. Leon J. Greenspan personally went to the office of Hoar, gathered and inspected documents, and made arrangements for the documents to be brought to the GJR office in White Plains, New York for examination by the Defendant. Accordingly, counsel could only produce those documents which were supplied by the client. Counsel could neither manufacture nor create documents merely because Defendant believed such documents to be in existence. At no time was any claim advanced that either the client or counsel withheld or secreted any document of interest to the Defendant.

With regard to the answers to interrogatories, an analysis of the interrogatory requests clearly reveals that they were directed toward damage theories and quantification and accounting information. All that counsel could do is what counsel did. That is, they made Hoar and its personnel aware of their discovery obligations. GJR urged them to have their accountants examine the financial material and prepare appropriate answers. GJR urged them to engage experts who would testify as to the damage theories as well as quantify the damages based upon such theories. Counsel could do no more. Counsel could not invent the numbers. It was the inability of Hoar and its personnel to timely fulfill these interrogatory requests, despite extensions of time obtained by GJR, that resulted in the orders to compel as well as the sanction orders here at issue.

As counsel for Hoar, GJR did all that they could. Counsel asked for and obtained extensions of time. GJR appeared before the Magistrate and pleaded on behalf of Hoar for even more time within which to fulfill the ever increasing interrogatory demands and to comply with the ever increasing requests for document production.

The record is replete with such correspondence. When GJR made the application for and received the extensions, they truly believed, in good faith, that their client, Hoar, would be able to supply the information to appropriately respond to the interrogatories. Nevertheless, for reasons never satisfactorily explained to GJR, Hoar was unable to supply the discrete information requested in order to answer the interrogatories then outstanding in a manner satisfactory to the Defendant or to the Magistrate.

It was not until October 23, 1987, under cover of a letter from Hoar with that date, that GJR were finally able to get financial statements which were necessary in order to fulfill outstanding interrogatories and outstanding document requests. It is obvious that the information was supplied to counsel by client long after the client was required to so do. It is obvious that all of the information requested was information particularly and uniquely within the knowledge of Hoar and clearly not within the knowledge of counsel. Since GJR could not get the information from Hoar, it was extremely difficult to prepare responses to interrogatories. Counsel did their best, but it proved unsatisfactory to the Defendant and the Magistrate.

As counsel, GJR pertinently and appropriately cautioned Hoar to comply with discovery obligations that were very specific. Needless to say, prompt compliance by Hoar with counsel's oral and written requests for sufficient information was not forthcoming. It was not until a FAX dated April 12, 1988 that GJR received, for the first time, a response to two years worth of requests by telephone, in person, and in writing, which finally contained some idea of how Hoar would quantify its damages. This was followed by additional information under cover of a letter from Hoar dated April 21, 1988. Within five days of receipt of the information, under cover of letter dated April 27, 1988, GJR sent to Hoar the responses to

interrogatories they had prepared for signature preparatory to service.

The record is replete with additional correspondence back and forth between counsel and client, setting forth outstanding discovery requests which had yet to be fulfilled, seeking fulfillment, seeking information and seeking cooperation.

Faced with an application by Defendant for sanctions brought on by motion dated June 27, 1988, as counsel for Hoar, GJR was faced with a classic dilemma. Should counsel tell the Magistrate, and of course their adversary, of the deficiencies in the cooperation which they had experienced with Hoar and cast the blame on the client for the failure to comply with discovery requirements? Or, should counsel attempt to articulate the client's position to the best of their ability? Obviously, if counsel cast the blame where it really lay — at the feet of Hoar, they would not be representing their client zealously, as required by Canon 7. If counsel preferred their own interests to those of their client, counsel was in a classic conflict of interest situation wherein they would be obligated to reveal the confidences and secrets of their client, and perhaps be in violation of Canon 4.

To their detriment, counsel chose to zealously represent the client and keep its confidences. Nevertheless, by letter dated July 26, 1988 to Hoar, Leon J. Greenspan enclosed a fourth set of interrogatories and a sixth request for the production of documents received from the Defendant. In so doing, Hoar was warned by its counsel:

> "We are facing an application by Hanes for $22,000 in legal fees because of the failure of Thomas E. Hoar, Inc. to supply information requested by Hanes in a timely manner. Please do not sit on this request the way the company has sat on all the earlier requests."

Any fair examination of available documentation will clearly reveal that failure to comply with discovery requests in a timely manner is the fault of Hoar and not the fault of counsel. On October 2, 1989, after a hearing on the motion by GJR to withdraw as counsel for Hoar, the Magistrate recommended that the District Court approve the withdrawal of GJR.

At all times, counsel has done that which they were entitled to do. Disagreeing with the Magistrate's rulings, counsel took the appropriate appeals to the District Court. Disagreeing with the District Court rulings, they took the appropriate appeals to the Second Circuit. Disagreeing with the Second Circuit rulings, counsel have now petitioned this Court for certiorari.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Southern District of New York is based upon Federal question, jurisdiction, the anti-trust laws of the United States which authorize suit in the District Court pursuant to 28 U.S.C. 1331; diversity jurisdiction, pursuant to 28 U.S.C. 1332; and the doctrine of pendant jurisdiction, in that those causes of action not otherwise covered by Federal question or diversity jurisdiction arise out of a common nucleus of operative facts.

REASONS FOR GRANTING THE WRIT

A. It Is Most Clear That The Imposition Of Sanctions Upon Counsel Jointly With The Client Pursuant To Rule 37 Without A Prior Warning Or A Hearing To Allocate Fault Is A Clear Violation Of The Fifth Amendment.

The applicable provision of the Fifth Amendment states:

> "No person shall be...deprived of...property, without due process of law;"

The problem becomes Constitutionally more egregious, when the orders under consideration imposing sanctions on counsel and client, jointly and severally, were those of a Magistrate purporting to act under authority of 28 U.S.C. 636. A Magistrate is not an Article III Judge. He has usurped Judicial authority, in violation of Article III of the United States Constitution, by ordering compliance with discovery and awarding sanctions for violation of his orders.

Our inquiry commences with an analysis of the relationship between Rules 11 and 37 of the Federal Rules of Civil Procedure. It is followed by an analysis of the authority of the Magistrate pursuant to 28 U.S.C. 636 to render orders pursuant to Rule 37 mandating compliance with discovery requests and then imposing sanctions against counsel, let alone the client, for failure to comply with the Magistrate's prior order.

Rule 11 is sharply focused upon the mandated duty of an attorney to conduct an investigation before he starts a litigation. Accordingly, where an attorney commences an action or signs a pleading, motion or other paper in violation of Rule 11, the Court is obligated, upon motion, or upon its own initiative, to impose sanctions. The client is only secondarily liable. The Rule states that this sanction ought to be imposed upon:

> "...the person who signed it, a represented party, or both."

Clearly, the primary obligation is upon the attorney — with the client being only secondarily liable. This is fair — because it is the attorney who must conduct the investigation before he institutes the litigation. If the client is at fault, after a warning — he too is sanctioned. Cf. *City of Yonkers v. Otis Elevator Company*, 844 F2d 42, 49 (2nd Cir. 1988).

The Rule in its present configuration has been in effect since August 1, 1983 with only a technical non-substantive amendment effective August 1, 1987. See, *Apex Oil Co. v. Belcher Co. of New York*, Inc., 855 F2d 1009 (2nd Cir. 1988) for a discussion of the relationship between Rules 11 and 26(g). The relationship is analogous.

Unlike Rule 11, the sanctions which may be imposed pursuant to Rule 37 for failure to comply with Court ordered discovery or otherwise fulfill required discovery obligations are focused primarily upon the party and only secondarily upon the attorney. This is fair — because it is the duty of the client to provide the information to counsel which must be then transmitted to the adversary through the medium of the attorney who prepared the interrogatories and other discovery fulfillment writings. Thus, while the attorney may continue to have Rule 11 obligations not to submit inappropriate discovery material in papers signed by the attorney, nevertheless, it is the client who is to be primarily sanctioned for failure to provide discovery or comply with discovery orders, as the client is the source of the information, not the attorney.

The dynamics of the Rule 37 applications are most clear. See the dicta in *Pierce v. Underwood*, 487 US __, 101 L.ed. 2d 490, 504, 108 S.Ct. 2541 (1988). First, if a party is aggrieved with responses to discovery requests, an application is made under Rule 37(a) to compel discovery. The plain language of the Rule calls for the application to be made to the *Court* (Rule 37(a)(1)), *not* to the Magistrate. In deciding the motion, the *Court* can award the expenses incurred to be paid by the party or deponent or the attorney advising the failure to comply (Rule 37(a)(4)), *not* the Magistrate.

Pursuant to Rule 37(b) sanctions may be awarded for failure to comply with a *Court* order obtained pursuant to Rule 37(a). Once again, this application is made to the *Court* and *not* to the Magistrate

(Rule 37(b)(2)). There then follows a list of sanctions which may be imposed by the *Court, not* by the Magistrate. Included in this list of sanctions is contempt (Rule 37(b)(2)(D)) as well as money sanctions (Rule 37(b)(2)(E)).

Specifically, pursuant to Rule 37(b)(2)(E), the sanction orders are to be imposed upon the party failing to obey the order or the attorney advising that party or both. On the face of the Rule, it is the party that is obligated to obey the discovery compliance order. If the party does not obey, disobedience is evident *per se*. However, what is not evident *per se* and does not logically or legally follow, is that the party failed to obey the discovery compliance order because he was advised to disobey by the attorney. Only a hearing can determine whether the failure to obey is based upon advice of counsel. *Ocelot Oil Corporation v. Sparrow Industries*, 847 F2d 1458, 1465 (10th Cir. 1988). It cannot be assumed that the client disobeyed the compliance order because he was told to do so by the attorney. To adopt such an assumption is to conclude that clients only disobey Court orders to provide discovery when told to do so by their attorneys. Such a conclusion is patently ridiculous.

Pursuant to Rule 37(d), where a party fails to answer interrogatories, the Rule 37(b) panoply of sanctions is equally available and may be imposed upon the party failing to act, upon the attorney advising that party, or both. Cf. *Badalmenti v. Dunham's, Inc.*, 896 F2d 1359,1362-1364 (Fed. Cir. 1990). Once again, the focus of the Rule is primarily on the party since it is the party who has the duty to provide the discovery. Accordingly, it is the party who is primarily liable for the failure to so do. The focus is only secondarily upon the attorney, and then only if it can be demonstrated, after a warning and after a hearing, that the attorney advised the party not to answer the interrogatories. Cf. *Cresswell v. Sullivan & Cromwell*, 704 F.Supp. 392, 406-407 (S.D.N.Y. 1989).

Clearly, without a warning or without a hearing, it is a deprivation of Fifth Amendment due process rights to impose sanctions upon the attorney.

It is clear from the record in this case that there was never any proof submitted, that the failure to obey — either the directions by the Magistrate or the orders of the District Court — was the result of GJR advising Hoar not to obey the Court orders or not to answer the interrogatories. Indeed, the contrary is the truth and the record so reflects. Cf. *Link v. Wabash Railroad Company*, 370 US 626, 636, 8 L.ed. 2d 774, 82 S.Ct. 1386 (1962).

Rule 37 has never been definitively construed by this Court on the issues presented by this application. The last time the Rule was substantively reviewed occurred in *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 US 197, 2 L.ed. 2d 1255, 78 S.Ct. 1087 (1958). In construing Rule 37 in its 1958 manifestation, this Court did not touch upon the issue of joint and several liability, or the powers of a Magistrate to order compliance with discovery, or to award sanctions. However, this Court granted certiorari in *Societe Internationale* because the lower Court dismissal pursuant to the Rule "...raised important questions as to the proper application of the Federal Rules of Civil Procedure,..." *Id*, 357 US 197, 203. While not specifically so stating, this Court took a plain English approach to its interpretation of Rule 37. This is specifically the same type of plain English approach that this Court appropriately took in its construction of the plain meaning of Rule 11 by its decision in *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 US ___, 107 L.ed. 2d 438, 110 S.Ct. 456 (1989). This Court pointed out for all with the eyes to see and the ability to comprehend:

> "We give the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute,

> '[w]hen we find the terms...unambiguous, judicial inquiry is complete'." *Id*, 107 L.ed. 2d 438, 443 (citations omitted)

Accordingly, when Rule 11 refers to the person who signed, it means just that — the attorney in his individual capacity and not the law firm of which he is a member or an associate. Unfortunately, this Court did not discuss joint and several liability in its *Pavelic & LeFlore* decision.

In *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 US 639, 49 L.ed. 2d 747, 96 S.Ct. 2778 (1976), this Court recognized implicitly that the District Court was to use its sanctioning authority to penalize those whose conduct may be deemed to warrant such a sanction, as well as to deter those who might be tempted to inappropriate conduct. *Id*, 427 US 639, 643. However, this Court went no further and did not reach the allocation of responsibility issue.

Next before this Court came *Roadway Express Inc. v. Piper*, 447 US 752, 65 L.ed. 2d 488, 100 S.Ct. 2455 (1980). However, the sanction issue before the Court was pursuant to 28 U.S.C. 1927. Rule 37 was only referred to in a footnote. *Id*, 447 US 752, 755. This Court recognized the possibility of joint and several liability referring to Southern District of New York cases. *Id*, 447 US 752, 763. However, there was no discussion of the rationale for the imposition of joint and several liability or the allocation thereof. The main opinion featured an observation by Mr. Justice Powell concluding that the Court has the power to tax attorneys' fees against a party who has litigated in bad faith *and* against counsel who willfully abused the judicial process. *Id*, 447 US 752, 766. However, Judge Powell stated:

> "Like other sanctions, attorneys' fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But in a proper case, such sanctions are within a Court's powers." *Id*, 447 US 752, 767.

In footnote 14, Judge Powell recognized the due process implications of sanctions where there was misconduct of litigation as discussed in the *Societe Internationale* case, determining that:

> "The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers." *Id*, 447 US 752, 767

Most clearly, in *Roadway Express*, this Court recognized the obligation that due process be afforded prior to the imposition of counsel fees and particularly prior to the imposition of counsel fees on attorneys representing the parties in the litigation. Accord: *FTC v. Alaska Land Leasing*, Inc., 799 F2d 507, 510 (9th Cir. 1986); *Tom Growney Equipment Inc. v. Shelley Irrigation Development, Inc.*, 834 F2d 833, 835-837 (9th Cir. 1987).

While of interest, the attempt to shift attorneys' fees and the cost of litigation to the losing party, the so called "British Rule" is not at issue in this case. The British Rule has been previously rejected by this Court. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 US 714, 718-721, 18 L.ed. 2d 475, 87 S.Ct. 1404 (1967) and *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 US 240, 247-257, 44 L.ed. 2d 141, 95 S.Ct. 1612 (1975). However, "the pass the cost to the losing party motive", has nevertheless, entered into the thinking of the Federal Judiciary by way of the ever burgeoning frequency of awards of attorneys' fees, particularly as sanctions

under Rules 11 and 37. See, *Chevron, U.S.A., Inc. v. Hand*, 763 F2d 1184, 1187 (10th Cir. 1985).

It appears that the last time this Court has taken a fairly comprehensive look at Rule 37 was in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 US 694, 72 L.ed. 2d 492, 102 S.Ct. 2099 (1982). In the opinion authored by Mr. Justice White, the Court commented on the limited jurisdiction of Federal Courts under Article III (*Id*, 456 US 694, 701-702). The opinion then went on to construe the issue before the Court as to whether Rule 37(b)(2) was appropriately applied so as not to violate due process. This Court concluded, that under the facts presented, both the Circuit and District Courts acted appropriately. *Id*, 456 US 694, 709.

Of significance to the issues before this Court on this application, is this Court's finding that an improper application of Rule 37(b)(2) will violate due process, while a proper application will support the presumption, as a matter of law, that there was no violation of due process. *Id*, 456 US 694, 706. Mr. Justice White then concluded, that if there was no abuse of discretion in the application of the Rule 37 sanction, there was no deprivation of due process. *Id*, 456 US 694, 706. However, as is clear from the presentation of the instant application to this Court, there was a thoroughly improper application of Rule 37 by the imposition of joint and several liability on counsel and client without prior warning, without hearing, without justification and without proof of counsel's culpability. Cf. *Cine Forty-Second Street Theatre Corp. v. Allied Artists Picture Corp.*, 602 F2d 1062, 1068-1069 (2nd Cir. 1979) and *Carlucci v. Piper Aircraft Corp., Inc.*, 775 F2d 1440, 1453-1454 (11th Cir. 1985).

Manifestly, this Court has never discussed joint and several liability for sanctions in an allocation of responsibility context

between counsel and client in any of its decisions, although there have been lower Court opinions that do so with varying results. The time has come for this Court to grant certiorari and once again substantively construe Rule 37 because of the important questions raised as to the proper application of the Federal Rules of Civil Procedure and 28 U.S.C. 636. The Bench and Bar require the guidance of this Court.

B. The Magistrate Has No Power To Order Compliance With Discovery Requests Or To Enforce Compliance By The Imposition Of Sanctions.

Pursuant to 28 U.S.C. 636, the applicable provisions of the Magistrate's Act, a Magistrate has limited powers specifically delineated by the statute as implemented by FRCP 72. Without belaboring the point, absent the consent of the parties, there appears to be nothing that a Magistrate may hear and determine upon referral from the Court, since the powers of the Magistrate to hear and determine set forth in 28 U.S.C. 636(b)(1)(A) are severely proscribed by the exceptions to the plenary grant. Most significantly, the Magistrate may not hear and determine motions for injunctive relief, but may only hear and recommend disposition thereof.

Of equal significance is the lack of power in the Magistrate to order compliance with discovery determinations. The Magistrate has no power to grant a mandatory injunction and no power to coerce compliance therewith. Finally, pursuant to 28 U.S.C. 636(e) the Magistrate has no power to adjudicate contempt. All that a Magistrate may do is certify to the District Court Judge the facts which the Magistrate believes constitute contemptuous acts or conduct, and serve or cause to be served, upon the person whose behavior is brought into question under this Section, an order requiring such person to appear before a Judge of the District Court,

on a date certain, to show cause why that person should not be adjudged in contempt by reason of the facts so certified. Thereafter, the District Court Judge hears the evidence, determines the contempt, and orders the punishment therefor, to the same extent as if contempt had been committed before that Judge. *In Re Kitterman*, 696 F.Supp. 1366, 1368-1371 (D. Nev. 1988); *Becker v. Dunkin' Donuts of America, Inc.*, 665 F.Supp. 211, 217 (S.D.N.Y. 1987).

This Court and the lower Federal Courts have consistently placed a very narrow construction on the power of the Magistrate. It is the Magistrate who hears and recommends. It is the District Court Judge who makes a *de novo* review and who bears the ultimate responsibility as the decision maker. *Mathews v. Weber*, 423 US 261, 270, 46 L.ed. 2d 483, 96 S.Ct. 549 (1976); *U.S. v. Raddatz*, 447 US 667, 673, 65 L.ed. 2d 424, 100 S.Ct. 2406 (1980); *Gomez v. U.S.*, 490 US ___, 104 L.ed. 2d 923, 931-936, 109 S.Ct. 2237 (1989); *U.S. v. Ford*, 824 F2d 1430, 1432-1435 (5th Cir. 1987).

Since a Magistrate is not an Article III Judge and performs his judicial functions under the supervision of an Article III Judge, any usurpation of the powers of an Article III Judge by a Magistrate violates the Constitution, even if the Magistrate purports to act under the direction of the District Court Judge. *U.S. v. Saunders*, 641 F2d 659, 663 (9th Cir. 1981).

Magistrate's orders are not self operating. *U.S. v. Rembert*, 694 F.Supp. 163, 167 (W.D.N.C. 1988). However, a Magistrate's order or report is not automatically the order of the District Court Judge; and without a District Court Judge order, there may be no appeal from sanctions imposed by a Magistrate who has no power to impose such sanctions. *Silberstein v. Silberstein*, 859 F2d 40, 41-42 (7th Cir. 1988) and *U.S. v. Mers*, 701 F2d 1321, 1337-1338 (11th Cir. 1983). As in *Gomez v. U.S.*, the Magistrate can undertake no activities not

specified by statute, even if he is told to do so by the District Court Judge. Op. Cit. 104 L.ed. 2d 923, 931-936.

The lower Federal Courts have recognized that Magistrates cannot hear and determine any pre-trial matter calling for any form of injunctive or coercive relief. *United Steel Workers of America v. Bishop*, 598 F2d 408, 411 (5th Cir. 1979) [injunction]; *U.S. v. Ritte*, 558 F2d 926, 927 (9th Cir. 1977) [contempt].

Without question, a decree from a Magistrate ordering compliance with his own discovery orders is a mandatory injunction. Without question, a decree by the Magistrate imposing sanctions is a coercive order in the nature of a contempt. Without question, a Magistrate has no power to render those determinations.

In *Levin v. Barish*, 505 Pa. 514, 481 A2d 1183, 1187 (1984) a most succinct definition of an injunction was articulated:

> "An injunction is a Court order prohibiting or commanding virtually any type of action."

In *Ulstein Maritime, Ltd. v. U.S.*, 833 F2d 1052, 1055 (1st Cir. 1987) an injunction was defined as a:

> "...coercive order by the Court directing a party to do or refrain from doing something and applies to future actions...."

It therefore follows, that if a District Court order was cast in injunctive terms and required the performance of certain acts, it was an injunction and thus an appealable order. *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures*, 422 US 289, 307-309, 45 L.ed. 2d 191, 95 S.Ct. 2336 (1975). It boggles the imagination that one could even attempt to argue that the direction to comply with discovery is not an injunctive order, or that the imposition of sanctions for failure to comply is not a coercive

order in the nature of contempt. Clearly, the Magistrate was without power to render such orders. Cf. 28 U.S.C. 636(b)(1)(A) and 28 U.S.C. 636(e). By so doing, the Magistrate has unconstitutionally usurped the powers of the District Court Judge and deprived Petitioners of their Fifth Amendment due process rights to adjudication by an Article III Judge rather than a Magistrate.

C. It Is A Violation Of Due Process Under The Fifth Amendment For A Magistrate, Let Alone The District Court, The Circuit Court Or Any Federal Court To Impose Sanctions Upon Counsel Without Warning, Without A Hearing And Without Proof That It Was Counsel Who Advised The Party Not To Comply With Court Orders Or Discovery Requests. Most Clearly, Allocation Of Responsibility Is Constitutionally Mandated.

For reasons never sufficiently explained, the Second Circuit Court of Appeals both in Hoar-I and in Hoar-II has failed to follow its own sound precedent that the imposition of a sanction *sua sponte*, is a deprivation of minimum due process and cannot be overlooked. On March 12, 1990 only three weeks prior to its decision in Hoar-II, in *Securities Industry Association v. Clarke*, 898 F2d 318, 322 (2nd Cir. 1990) the Second Circuit reversed an award of sanctions, relying on its own prior authority, stating:

> "A District Court's failure to provide adequate notice and the opportunity to be heard would in itself provide the ground for reversal of an order imposing sanctions. Such a deprivation of the minimum due process cannot be overlooked." *Id*, at 322 (citations omitted)

The Second Circuit, with the exception of Hoar-I and Hoar-II has consistently determined, that at a minimum, notice and an opportunity to be heard are required. See for example, *The Sanko*

S.S. Co., Ltd. v. Galin, 835 F2d 51, 53 (2nd Cir. 1987). This is in accord with other Circuit Courts which also require a hearing as well as specific findings of fact to justify the imposition of sanctions.

For reasons never satisfactorily explained, the Second Circuit has departed from its long standing rule, that before sanctions can be ordered against an attorney as well as a client, there has to be an allocation hearing. *In Re Yellen & Herstic v. U.S.*, 804 F2d 191, 193 (2nd Cir. 1986). Indeed, the per curiam opinion stated:

> "We have frequently asked the District Courts, in imposing sanctions, to make careful apportionment of the costs among the responsible parties. We affirm an award of Rule 37 sanctions, but remand it for a determination of whether the losing party or its attorney should bear the cost." *Id*, at 193.

The per curiam opinion also recognized that there should not be an award of Rule 37 sanctions without a hearing, as it is somewhat akin to a finding of and punishment for contempt without a hearing. *Id*, at 193.

Other Federal Courts passing on the issue require an allocation hearing before the imposition of sanctions upon an attorney: *Weisberg v. Webster*, 749 F2d 864, 873-875 (D.C. Cir. 1984); *Hamilton v. Neptune Orient Lines, Ltd.*, 811 F2d 498, 500 (9th Cir. 1987); *In Re Baker*, 744 F2d 1438, 1442 (10th Cir. 1984), cert. den. 471 US 1014 (1985); *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F2d 869, 872-874 (10th Cir. 1987); *Ikerd v. Lacy*, 852 F2d 1256, 1259 (10th Cir. 1988); *Turnbull v. Wilcken*, 893 F2d 256, 259 (10th Cir. 1990); *Bastien v. R. Rowland & Co.*, 116 FRD 619, 622 (E.D. Mo. 1987), aff'd 857 F2d 482 (8th Cir. 1988); *In Re Ruben*, 825 F2d 977, 990 (6th Cir. 1987), cert. den. 484 US 934 (1988); *Quiros v. Hernandez Colon*, 800 F2d 1, 2-3 (1st Cir. 1986); *Smith*

International, Inc. v. Texas Commerce Bank, 844 F2d 1193, 1201-1202 (5th Cir. 1988); *In Re Cloud*, 107 B.R. 156 (N.D. Ill. 1989).

Other Second Circuit authority requiring an allocation hearing prior to the imposition of sanctions upon an attorney can be found in the following decisions: *Eastway Construction Corp. v. The City of New York*, 821 F2d 121, 124 (2nd Cir. 1987); *Penthouse International, Ltd. v. Playboy Enterprises, Inc.*, 663 F2d 371, 392 (2nd Cir. 1981); *Imperial Chemicals Industries, PLC v. Barr Laboratories, Inc.*, 126 FRD 467, 473 (S.D.N.Y. 1989).

Most clearly, an allocation hearing is necessary to resolve the conflict of interest that arises when an attorney and a client blame each other and sanctions appear to be appropriate. *Hamilton v. Neptune Orient Lines*, Ltd., 811 F2d 498, 500 (9th Cir. 1987). Most clearly, the lawyers' ethical obligations under Canons 4 and 7 of the Code of Professional Responsibility enter into the equation. Cf. *In Re Grievance Committee*, 847 F2d 57, 61-64 (2nd Cir. 1988) and *Operating Engineers Pension Trust v. A-C Company*, 859 F2d 1336, 1344-1345 (9th Cir. 1988). Due process requires an allocation of fault. The attorney does not insure the adversary that his client will provide discovery or obey discovery orders. In this sense, there is no liability without fault. An attorney who advises a client to disobey is sanctionable. Without such a finding, and without an allocation hearing, sanctions cannot be constitutionally imposed upon the attorney.

CONCLUSION

It has been conclusively established that this petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be in all respects granted. The issues raised herein concern every attorney engaged in discovery in every Federal Court.

The decision of this Court will impact on discovery sanctions in every State Court where the issue arises under the Fourteenth Amendment. Significant due process rights are involved as well as construction of the Magistrate's Act and Rules 11 and 37 of the Federal Rules of Civil Procedure.

In ever increasing frequency, the Courts, both Federal and State, are besieged with a burgeoning barrage of sanction applications. Satellite litigation now consumes an ever increasing increment of Judicial time and talent to the detriment of litigant and litigator alike. It would be difficult to conceive of a more timely topic or manifestly more appropriate vehicle than this case for this Court to pass upon such significant Constitutional issues as presented by Petitioners herein, resolution of which shall have so wide an impact on the entire Bench and Bar.

Respectfully submitted,

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Of Counsel

June 25, 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1070, 808—August Term, 1988

(Argued: April 19, 1989 Decided: August 10, 1989)

Docket Nos. 88-7962, 88-9010

THOMAS E. HOAR, INCORPORATED,

Plaintiff-Appellant,
Cross-Appellee,

—v.—

SARA LEE CORPORATION, et al.,

Defendants-Appellees,
Cross-Appellants.

B e f o r e :

LUMBARD, ALTIMARI, and MAHONEY,
Circuit Judges.

Appeal and cross-appeal from an order entered in the United States District Court for the Eastern District of New York (Thomas C. Platt, *Ch. J.*) that imposed a sanc-

tion on plaintiff and attorney with joint and several liability pursuant to Fed. R. Civ. P. 37.

Affirmed.

LEON J. GREENSPAN, Esq., White Plains, New York (Greenspan, Jaffe & Rosenblatt, White Plains, New York, of counsel), *for Plaintiff-Appellant and Cross-Appellee.*

RUSSELL H. CARPENTER, Esq., Washington, D.C. (Covington & Burling, Washington, D.C., and Frederick Newman, Esq., Blodnick, Pomeranz, Schultz & Abramowitz, Lake Success, New York, of counsel), *for Defendants-Appellees and Cross-Appellants.*

ALTIMARI, *Circuit Judge*:

Plaintiff Thomas E. Hoar, Inc. ("Hoar") and its attorney (collectively "appellants") appeal from an order of the United States District Court for the Eastern District of New York (Thomas C. Platt, *Ch. J.*) that imposed a sanction on them with joint and several liability for expenses including attorneys' fees pursuant to Fed. R. Civ. P. 37. Appellants argue that the district court improperly found that they abused the discovery process warranting the imposition of the Rule 37 sanction. Defendants-appellees, Sara Lee Corp., ("Sara Lee") and its subsidiary Hanes Knitwear/Printables ("Hanes"), cross-appeal contending that the district court's order, which reduced the amount

of the sanction originally imposed by the magistrate to $14,815.40, does not reflect full recovery of their reasonable expenses including attorneys' fees under Rule 37.

For the reasons stated below, we affirm the order of the district court.

BACKGROUND

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the threshold issue of appealability and of the merits of this appeal. The underlying litigation to the present appeal was initiated in May, 1986. Alleging, *inter alia*, violation of the antitrust laws, plaintiff Hoar, a distributor of men's and boy's underwear, filed suit against defendants Sara Lee and its subsidiary Hanes, a manufacturer and supplier. The defendants counter-claimed alleging fraud and breach of contract.

Since its initiation over three years ago, the discovery process in this suit has tread a rocky road as a result of numerous disputes between the parties. A search of the record discloses that at several junctures Hoar failed to fulfill defendants' legitimate discovery requests and to comply with court orders compelling complete discovery.

The protracted trek commenced when Hoar neglected to answer the defendants' first set of interrogatories by the due date of June 3, 1987. Only after the defendants moved to compel discovery pursuant to Rule 37(a) did Hoar respond on July 16, 1987. When Hoar was remiss in responding to the defendants' second and third sets of interrogatories, due on July 7, 1987 and July 27, 1987 respectively, the discovery process continued to flounder. Hoar eventually tendered answers to both sets of interrog-

atories on September 10, 1987. After reviewing these responses, the defendants alleged that Hoar had proffered incomplete and inadequate answers. The defendants again moved the court to compel adequate responses.

At a conference held on December 18, 1987, the magistrate attempted to clear a straight path by allowing Hoar four additional months in which to comply and ordering full satisfaction of all previous outstanding discovery by April 29, 1988. Hoar, however, continued to obstruct the thoroughfare of discovery with its deficient responses. As a result, on May 3, 1988, it was necessary to hold an additional conference before the magistrate. At this conference, defendants noted that despite their repeated efforts to secure answers to certain interrogatories, Hoar still had not furnished an itemized damage claim, but merely asserted that the defendants' violation of the antitrust laws had caused over one and one-half million dollars in lost profits. In addition, the defendants pointed out sundry gaps in document production.

Confronted with these and other deficiencies, Hoar sought an additional 30 days in which to comply. The magistrate granted a 45-day extension setting June 17, 1988 as "the absolute final date for compliance." Disregarding the court's second mandate, Hoar once more encumbered the path to full discovery by allowing June 17, 1988 to pass without any significant attempt to comply.

More than two years after the initiation of the suit, on September 2, 1988, the magistrate granted the defendants' Rule 37 motion. He imposed a sanction in the amount of $22,990.09 to compensate defendants for their reasonable expenses including attorneys' fees incurred due to appellants' hindrances of discovery. Specifically, pursuant to

Rule 37(b)(2), the magistrate allocated the sums of $9,523.50 and $11,990.60 for appellants' failure to comply with the court orders of January 5, 1988 and May 10, 1988 respectively. In addition, the magistrate allocated the sum of $1,475.99 for the costs of defendants' December, 1987 motion to compel pursuant to Rule 37(a)(4). The magistrate concluded that the appellants had engaged in a "pattern of ignoring discovery requests" so as to "willfully and unnecessarily" prolong the litigation. Hoar and its attorney were held to joint and several liability for the Rule 37 sanction.

Hoar and its attorney next appealed to the district court seeking a reversal of the sanction. After reviewing the matter, Chief Judge Platt held that the Rule 37 sanction was warranted. However, in an order dated October 11, 1988, he reduced the amount of the compensatory sanction to $14,815.40 "given the routine nature of [defendants'] reviewing and cataloging discovery materials to determine the extent of compliance." Subsequently, in response to appellants' request for clarification of the October 11, 1988 order, the district judge affirmed that Hoar and its attorney were jointly and severally liable for the sanction.

On this appeal of the sanction imposed by the district court, appellants now argue, as an initial matter, that the district court's order is appealable. They also contend that the district court imposed the sanction in a manner that disregarded the "true facts of the case" and was "contrary to law." Further, they claim that the district court's order should be reversed because of a lack of due process.

The defendants assert that this court lacks jurisdiction over the interlocutory appeal. They further argue that the district court was well within its discretion to impose the Rule 37 sanction. In addition, they cross-appeal maintain-

ing that the district court's order, in so far as it reduced the amount of the sanction imposed by the magistrate, does not provide for their full recovery of reasonable expenses including attorneys' fees pursuant to Rule 37. Finally, defendants request attorneys' fees and costs incurred by reason of this appeal.

DISCUSSION

1. *Jurisdiction*

Appellants contend that this court has jurisdiction over the appeal under 28 U.S.C. § 1291. It is well established that "as a general rule a district court's decision is appealable under . . . [Section 1291] only when the decision 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment,' " *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, ____, 108 S.Ct. 1133, 1136 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). A "small class" of district court orders, however, has long been understood to constitute an exception to the "final judgment rule." The Supreme Court held in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1948), that some rights are simply "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." In elaborating *Cohen's* "collateral order" exception, the Court has forged a three-part test to ascertain whether an order that does not finally resolve litigation is nonetheless appealable pursuant to Section 1291. The order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. *Gulf-*

stream Aerospace, 485 U.S. at ____, 108 S.Ct. at 1136-37; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

In *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983), we held that a non-party attorney may bring an interlocutory appeal of a Rule 37 sanction pursuant to the *Cohen* exception. As to the first requirement, the assessment of the Rule 37 sanction in the amount of $14,815.40 by the district court, after an appeal of the magistrate's order, amounts to a "conclusive determination." *Cheng*, 713 F.2d at 889. *See also Sanko S.S. Co., Ltd. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987); *David v. Hooker, Ltd.*, 560 F.2d 412, 417 (9th Cir. 1977). *But see Eastern Maico Distributors, Inc. v. Maico-Fahrzeugfabrik*, 658 F.2d 944, 951 (3d Cir. 1981). The second requirement is satisfied, since the imposition of the sanction involves an issue "completely separate from the merits of the underlying litigation." *Cheng*, 713 F.2d at 889. *See also Sanko*, 835 F.2d at 53.

The third *Cohen* requirement presents a thornier issue. In *Cheng*, however, we enumerated several reasons why a sanction imposed on a non-party attorney is effectively "unreviewable after final judgment."[1] First, in the face of settlement negotiations, an attorney might be placed in an "ethical dilemma" since "his view of any settlement pro-

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1 In holding that the *Cohen* requirements were met with respect to a non-party attorney's interlocutory appeal of a Rule 37 sanction, the court in *Cheng* stated:

> We recognize that in *Independent Investor Protective League v. Touche Ross & Co.*, 542 F.2d 156, 158 (2d Cir. 1976), this court in dictum suggested that a non-party attorney may in some circumstances be 'so allied with a party as to preclude interlocutory review of an order to pay compensatory expenses.'

713 F.2d at 890. We are not so persuaded by the force of the solitary dictum in *Independent Investor* that we think it ought to be the law which governs the case at hand.

posal would almost certainly be colored by its handling of the attorneys' fee issue." *Cheng*, 713 F.2d at 889-90. In addition, the plaintiff's attorney, as a non-party, would be dependent on the plaintiff for appellate review which would be unlikely "[i]f the case is settled, or if appellant succeeds on the merits." *Id.* at 890. Most importantly, a non-party attorney, like a non-party in civil contempt proceedings, would be precluded from arguing the propriety of the Rule 37 sanction for attorneys' fees including expenses in an appeal from the final judgment. *Id.* at 890. *See also Sanko*, 835 F.2d at 53; *Hooker*, 560 F.2d at 417.

We note that forcing an attorney to await final judgment, with such a sanction outstanding against him, may seriously affect his professional reputation; it will almost certainly affect the attorney's relations with his client as they must determine the share of the financial burden which each of them must bear in discharging the obligation imposed against them jointly. Therefore, the attorney should be able to appeal before any final judgment. He suffers immediate injury from the sanction whereby the court has made him a party to the case so far as the sanction is concerned. His only effective remedy is to have the right to appeal before the final judgment. Accordingly, consistent with our holding in *Cheng*, we would grant jurisdiction were the sanction imposed on the non-party attorney alone, since unless there is the opportunity for review at this point in the proceedings, there effectively is no right to review at all.

If, instead, only the plaintiff had been held liable for the Rule 37 sanction, the final judgment rule would prohibit the plaintiff's interlocutory appeal of the order. In the case at hand, however, the sanction was imposed jointly and severally on the plaintiff and non-party attorney. The

evident conflict between the finality requirement as it applies to the plaintiff and to the non-party attorney requires us to balance the integrity of the final judgment rule against the harm caused by possibly forcing one of the appellants to forfeit the opportunity for appellate review.

The final judgment rule was never intended to preclude the right to review. As the Supreme Court observed some time ago, the finality requirement "has been departed from only when observance of it would practically defeat the right to review at all." *Cobbledick v. United States*, 309 U.S. 323, 324-325 (1940) (Frankfurter, *J.*). *Cf.* Note, "The Finality Rule for Supreme Court Review of State Court Orders," 91 *Harv. L. Rev.* 1004, 1008-12 (1978). In the present case, the right to review of the district court's order that imposed the sanction on appellants can be guaranteed only by the option of one immediate interlocutory appeal. Although caution must be exercised in creating exceptions to the final judgment rule, we think that one is justified based on the facts of this case. Accordingly, we conclude that the harm caused by denying one of the appellants the right to review outweighs a mechanical application of the final judgment rule.

Moreover, the final judgment rule rests, in part, upon the larger principle that "judicial efficiency" is best served by restricting interventions by courts of appeals into the trial process. *See United States v. Nixon*, 418 U.S. 683, 690 (1974). "Congress . . . has by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick*, 309 U.S. at 325. Yet, in this case, a rigid adherence to the final judgment rule could well lead to a judicially inefficient outcome. Given the exigency of providing the non-party attorney the opportunity

for appellate review at the time sanctions are imposed, an application of the principle of judicial efficiency suggests that the plaintiff be permitted to join the interlocutory appeal. To require separate appeals would belie the Congressional intent that underpins the finality requirement of Section 1291. For all these reasons, we conclude that this court has jurisdiction over appellants' interlocutory appeal pursuant to Section 1291.

2. *The Rule 37 Sanction*

Turning to the merits of this appeal, we now consider whether the district court erred in ordering appellants to pay defendants' reasonable expenses including attorneys' fees pursuant to Rule 37. When reviewing a district court's imposition of a Rule 37 sanction, the question is not whether this court, *de novo*, would apply the same sanction, but whether the district court exceeded the bounds of its "wide discretion." *Sieck v. Russo*, 869 F.2d 131, 134 (2d Cir. 1989); *Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988). Moreover, we shall not disturb the factual findings of a district court, upon which a sanction is deemed warranted, unless they are shown to be "clearly erroneous". *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982); *Argo Marine Systems, Inc. v. Camar Corp.*, 755 F.2d 1006, 1010 (2d Cir. 1985); *see also* Fed. R. Civ. P. 52(a).

The broad scope of discovery delimited by the *Federal Rules of Civil Procedure* is designed to achieve disclosure of all the evidence relevant to the merits of a controversy. *See* Fed. R. Civ. P. 26(b)(1); *see also* Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487, 497-508 (1970) ("Statement"). In addition, discovery was designed to

proceed at the initiative of the parties with a minimum of court intervention. *See* Statement at 488. The rulemakers framed Rule 37 in recognition of the potential for abuse during the discovery process. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam).

a. *Appellants*

Appellants argue that the district court imposed the sanction contrary to the facts and law. The record, however, is replete with examples of appellants' failure to cooperate with the discovery process. In particular, the district court found that, more than one year after the responses were due, the appellants had not yet responded adequately to the defendants' second and third sets of interrogatories and prayers for certain document production. After hearing the parties, the court concluded that appellants' unjustified nondisclosure caused the defendants to bear costs which would not have been necessary had appellants cooperated during discovery. In short, appellants neglected to respond of their own initiative, ignored due dates, necessitated defendants' motions to compel, and disobeyed at least two previous court orders before the sanction was imposed.

On more than one occasion, we have " 'emphasize[d] the importance we place on a party's compliance with discovery orders,' and we warned that '[a] party who flouts such orders does so at his peril.' " *Sieck*, 869 F.2d at 133 (quoting *Update Art*, 843 F.2d at 73). It is plain upon the record that appellants failed to cooperate with legitimate discovery requests necessitating defendants to make several motions to compel discovery, and subsequently disobeyed two court orders compelling full discovery. As a

result, they have incurred the legal consequences clearly stated in Rule 37(a)(4) and (b)(2). After a search of the record, we find nothing to indicate that the district court's imposition of the sanction was either based on erroneous factual findings or an abuse of its discretion.

b. *Cross-Appellants*

Defendants cross-appeal arguing that the district court was in error when it reduced the amount of the sanction. Since the district court reduced the sanction after a review of the magistrate's order, and provided a sound explanation for the reduction, we find no reason to disturb the district court's exercise of its discretion as to the amount of the sanction imposed.

3. *Due Process*

Appellants further argue that even if the Rule 37 sanctions were warranted, the district court's order must be reversed for a lack of due process. Appellants contend that the Supreme Court's decision in *Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980), requires reversal of the district court's order. In that decision, the Court observed that "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.* at 767. The proceedings that led to the district court's imposition of the sanction included several conferences before the magistrate, two court orders, the hearing at which the magistrate imposed the sanction, an appeal of the magistrate's order, and a review of the matter by the district court. In view of these proceedings, it stretches the imagination to argue that appellants did not have notice of, or the opportunity to be heard about, the sanction imposed. Accordingly, we find no deprivation of due process.

Appendix A

CONCLUSION

For all the reasons stated above, the order of the district court is affirmed. Each side shall bear its own costs for this appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 724—August Term 1989

(Argued March 6, 1990 Decided April 2, 1990)

Docket No. 89-7934

THOMAS E. HOAR, INC.,

Plaintiff,

—v.—

SARA LEE CORP.,

Defendant-Appellee,

GREENSPAN, JAFFE & ROSENBLATT, LEON J. GREENSPAN, PAUL D. JAFFE and VICTOR E. ROSENBLATT,

Appellants.

B e f o r e :

TIMBERS, MESKILL and ALTIMARI,

Circuit Judges.

Appeal from an order entered August 29, 1989, in the Eastern District of New York, Thomas C. Platt, Jr., *Chief Judge*, imposing sanctions upon appellant law

firm and its client, including joint and several liability for attorneys' fees and costs, for discovery violations.

Affirmed.

LEON J. GREENSPAN, White Plains, N.Y. (Greenspan, Jaffe & Rosenblatt, White Plains, N.Y., on the brief) *for appellants Greenspan, Jaffe & Rosenblatt, Leon J. Greenspan, Paul D. Jaffe and Victor E. Rosenblatt.*

RUSSELL H. CARPENTER, JR., Washington, D.C. (Richard Wm. Buchanan, and Covington & Burling, Washington, D.C.; Frederick Newman, and Blodnick, Pomeranz, Schultz & Abramowitz, Lake Success, N.Y., on the brief) *for appellee Sara Lee Corp.*

TIMBERS, *Circuit Judge*:

Appellant Greenspan, Jaffe & Rosenblatt ("Greenspan"), a law firm, appeals from an order entered August 29, 1989, in the Eastern District of New York, Thomas C. Platt, Jr., *Chief Judge*, imposing sanctions, pursuant to Fed. R. Civ. P. 37, upon Greenspan and its client Thomas E. Hoar, Inc. ("Hoar") for failure to comply with discovery orders.

After reviewing the magistrate's report and recommendation, the district court agreed with and accepted

the magistrate's finding that Hoar had not complied with court orders compelling discovery. Accordingly, the court imposed evidentiary sanctions upon Hoar in its underlying antitrust action. It also held Hoar and its attorney, Greenspan, jointly and severally liable for monetary sanctions, representing attorney's fees and costs, in the amount of $21,984.24. The instant appeal is by Hoar's attorney, Greenspan. Hoar has withdrawn its appeal.

On appeal, Greenspan contends that (1) the district court erred in failing to review *de novo* the magistrate's report and recommendation; (2) the court's failure to allocate fault and apportion costs violated its due process rights; and (3) the court erred in awarding attorney's fees without requiring contemporaneous documentation.

For the reasons which follow, we affirm the order of the district court.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Plaintiff Thomas E. Hoar, Inc. was a former distributor of men's and boy's underwear manufactured by Hanes Knitwear ("Hanes"), a division of appellee Sara Lee Corporation ("Sara Lee"). In May 1986, Hoar commenced the underlying action against Sara Lee and its subsidiary Hanes, alleging, *inter alia*, violations of the antitrust laws. Sara Lee counterclaimed for fraud and breach of contract.

Appendix B

Since the initiation of the underlying antitrust action, there have been numerous discovery disputes between the parties. These disputes resulted in our earlier decision in *Thomas E. Hoar, Inc.* v. *Sara Lee Corp.*, 882 F.2d 682 (2 Cir. 1989) (Altimari, J.) ("*Hoar I*"), which affirmed a district court order imposing monetary sanctions, pursuant to Fed. R. Civ. P. 37, on Hoar and its attorney Greenspan for abuse of the discovery process.

In *Hoar I*, we held that, during a two-year period, "at several junctures Hoar failed to fulfill [Sara Lee's] legitimate discovery requests and to comply with court orders compelling complete discovery." 882 F.2d at 684. The history of this "protracted trek" began with Hoar's failure to respond timely to Sara Lee's interrogatories in May and June of 1987. That failure led to motions to compel discovery and two discovery conferences before Magistrate John L. Caden, who set deadlines for compliance with his discovery orders. Hoar disregarded these orders. On September 2, 1988, concluding that Hoar and its attorney had engaged in a "pattern of ignoring discovery requests" to "willfully and unnecessarily" prolong the litigation, the magistrate imposed monetary sanctions pursuant to Rule 37, and held Hoar and its attorney to be jointly and severally liable. The magistrate also warned Hoar that further failure to comply with the court's orders would result in evidentiary sanctions. On appeal to the district court, the latter affirmed the imposition of sanctions but reduced the award. We affirmed in all respects. *Hoar I*, 882 F.2d at 682.

This brings us to the underlying facts of the instant appeal. In October 1988, because of Hoar's failure to comply with the magistrate's September 2 order, Sara

Lee once again was forced to make motions to compel discovery. On November 29, 1988, the magistrate granted these motions. He found that Hoar had failed repeatedly to provide proper discovery in violation of three court orders, and that Hoar "simply reiterate[d] old arguments as to why the interrogatories need not be answered any more fully than they already have. . . ." Hoar's failure to answer the interrogatories, he concluded, "clearly amount[ed] to either wilful disobedience of prior orders of this court, or a 'total dereliction of professional responsibility amounting to gross negligence.' " Accordingly, he imposed Rule 37 sanctions precluding admission of certain evidence at trial and ordered Hoar to comply with discovery requests or face further preclusion. Sara Lee was directed to submit an accounting of its costs and attorneys' fees in connection with its motions.

On appeal to the district court, Chief Judge Platt, by order dated January 12, 1989, gave Hoar additional time to comply. He set a deadline for compliance with the magistrate's order and warned that "[f]ailure to [do so] will result in automatic affirmation of [the magistrate's] November 29, 1988 Memorandum and Order." Hoar thereafter filed supplemental responses. The district court referred these responses to the magistrate for review to determine whether Hoar had complied.

On March 16, 1989, after reviewing Hoar's responses, the magistrate concluded that Hoar had not complied fully with court orders compelling discovery. He recommended that the sanctions imposed in his November 29 order be affirmed and that the contingent sanctions provided for in that order be imposed. The magistrate further recommended that monetary sanctions be imposed

upon Hoar and its attorney, jointly and severally, in the amount of $21,984.24, representing reasonable costs and attorneys' fees.

Hoar objected to the magistrate's report and recommendation. It appealed to the district court. After reviewing Hoar's objections, the district court, by order dated August 29, 1989, agreed with the magistrate's finding of noncompliance. Recalling that its prior order provided for "automatic affirmation" of the magistrate's order of November 29, 1988, the court imposed the Rule 37 sanctions set forth in that order. It also "adopted" the magistrate's recommendation that monetary sanctions in the amount of $21,984.24 be imposed jointly and severally upon Hoar and Greenspan.

This appeal by Hoar's attorney, Greenspan, followed. Hoar has withdrawn its appeal.

II.

Our review of the district court's order imposing Rule 37 sanctions is limited to the question whether the court abused its discretion. *Hoar I*, *supra*, 882 F.2d at 687. Moreover, we must accept the court's findings of facts underlying the sanctions unless clearly erroneous. *Id.*

III.

With the foregoing in mind, we turn first to Greenspan's contention that the district court reviewed the magistrate's report and recommendation of March 16, 1989 under the incorrect standard. Specifically, Greenspan asserts that the court erred in failing to make a *de novo* determination, pursuant to 28 U.S.C. § 636(b)(1)

(1988) and Fed. R. Civ. P. 72(b), as to whether Hoar's supplemental responses were in compliance with court orders compelling discovery. We hold that Greenspan, which no longer represents Hoar, has no standing to challenge the court's order on this ground.

28 U.S.C. § 636(b)(1)(A) provides that "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court," except for certain enumerated dispositive motions. *See also* Fed. R. Civ. P. 72(b) (referring to dispositive motions as those "dispositive of a claim or defense of a party"). Although a magistrate may hear dispositive pretrial motions, he may only submit proposed findings of fact and recommendations for disposition of the matter. The district court must make *de novo* determinations as to those matters to which the party has objected. § 636(b)(1)(B)-(C); Fed. R. Civ. P. 72(b). The court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b). A magistrate, however, may issue orders regarding nondispositive pretrial matters. The district court reviews such orders under the "clearly erroneous or contrary to law" standard. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

Matters concerning discovery generally are considered "nondispositive" of the litigation. 7 Moore, Lucas & Sinclair, Jr., Moore's Federal Practice ¶ 72.03, at 72-23 (2d ed. 1989); 12 Wright, Miller & Elliot, Federal Practice & Procedure § 3076.5 (Supp. 1989). Monetary sanctions pursuant to Rule 37 for noncompliance with discovery orders usually are committed to the discretion of the magistrate, reviewable by the district court under the "clearly erroneous or contrary to law" standard.

E.g., *Ocelot Oil Corp.* v. *Sparrow Indus.*, 847 F.2d 1458, 1465 (10 Cir. 1988); *Merritt* v. *Int'l Bhd. of Boilermakers*, 649 F.2d 1013, 1016-18 (5 Cir. 1981); *see also* Moore, Lucas & Sinclair, Jr., *supra*, ¶ 72.04, at 72-51. According to Professor Moore, however, the imposition of certain sanctions under Rule 37, in some instances, may be considered "case-dispositive," requiring *de novo* review. *Id.* ¶ 72.03, at 72-24 and ¶ 72.04, at 72-51; *e.g*, *Ocelot Oil Corp.* v. *Sparrow Indus.*, *supra*, 847 F.2d at 1462 (Rule 37 sanction striking pleadings with prejudice constitutes involuntary dismissal of action within § 636(b)(1)(A)).

In reviewing the district court's order imposing Rule 37 sanctions, we observe that Hoar has withdrawn its appeal. Since Greenspan is not subject to the preclusive sanctions imposed by the court's order, we hold that Greenspan has no standing to challenge the propriety of those sanctions. Under the circumstances of the instant case, we further hold that Greenspan's interest in appealing the court's order is limited to the monetary sanctions for which Hoar and Greenspan were held jointly and severally liable. Such sanctions, as we indicated above, are reviewed under the "clearly erroneous or contrary to law" standard. We hold that Greenspan has no standing to challenge the district court's order on the ground that the court failed to make a *de novo* determination.

In passing, we observe that, even if there were some basis for requiring a *de novo* determination, the district court complied with that standard. Greenspan concedes that "[t]he only factual issue rightly before Judge Platt was the adequacy of [Hoar's] post January 12, 1989 compliance." In reaching its decision, the district court

clearly made an independent determination of this issue (whether or not it was required to do so). The court first observed that "[i]n his Report, Magistrate Caden finds that [Hoar] has not complied with the undersigned's Order, dated January 12, 1989." It then stated that, "[h]aving reviewed [Hoar's] objections, [and Sara Lee's] responses, we agree with Magistrate Caden's findings." Thus, the order indicates that the court independently reviewed the issue whether Hoar had complied with the discovery orders. The court's subsequent comments, to which Greenspan points as indicating a refusal to make a *de novo* determination, relate only to matters decided by the court's January 12, 1989 order, not to the issue of noncompliance. In that regard, the court stated:

> "In its appeal, [Hoar] essentially seeks a second review of Magistrate Caden's November 29, 1988 Order. We reviewed that Order and plaintiff's objections thereto, which resulted in our January 12, 1989 Order, and decline to do so again here. . . . By our Order dated January 12, 1989, we accepted Magistrate Caden's prior findings and orders but nonetheless gave [Hoar] additional time to comply."

In short, we find nothing in the court's order that indicates that it applied a "clearly erroneous or contrary to law" standard in reviewing the question whether Hoar complied with the discovery orders, or that it did not independently determine that issue.

After carefully reviewing the record, we hold that the district court properly exercised its discretion in imposing the Rule 37 sanctions.

IV.

(A)

This brings us to Greenspan's contention that, even if the Rule 37 sanction were warranted, the district court's order must be reversed for lack of due process. Greenspan asserts that the court erred in failing to hold a hearing to determine fault and allocate the sanctions between Hoar and Greenspan accordingly. We find this contention to be without merit.

At the outset, we are reminded that similar due process claims were raised and considered in *Hoar I*, *supra*, 882 F.2d at 688. To review briefly, in *Hoar I* the district court imposed monetary sanctions on Hoar and Greenspan, jointly and severally, for abuse of the discovery process. Relying on *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), appellants challenged that order on due process grounds. In considering this claim, we found that

> "[t]he proceedings that led to the district court's imposition of the sanction included several conferences before the magistrate, which resulted in two court orders, the hearing at which the magistrate imposed the sanction, and a review of the matter by the district court."

Hoar I, *supra*, 882 F.2d at 688. Accordingly, we held there was no deprivation of due process.

Greenspan challenges the correctness of our holding in *Hoar I*. It asserts that we erred "in ignoring [our] own precedent by failing to remand for a determination of fault, allocation and reasonableness." It urges us to vacate our decision in *Hoar I* and remand the matter to

the district court for a hearing to determine fault and allocate the Rule 37 sanctions accordingly. We decline to do so. Greenspan ignores the well-settled rule that "a panel of this court will not overturn a recent decision of another panel, rendered after full consideration of the very point at issue." *Kremer* v. *Chemical Constr. Corp.*, 623 F.2d 786, 788 (2 Cir. 1980) (Friendly, J.) (citing cases), *aff'd*, 456 U.S. 461 (1982). Moreover, we have no doubt that *Hoar I* was decided correctly. We reaffirm the vitality of that decision.

For reasons similar to those stated in *Hoar I*, we reject Greenspan's due process claim on the instant appeal. The proceedings that led to the district court's imposition of sanctions here included written oppositions to Sara Lee's motions to compel discovery before the magistrate, the magistrate's order of November 29, 1988 imposing sanctions, two memoranda on the appeal of that order, a written opposition to Sara Lee's declaration of attorneys' fees, an initial review by the district court and an order granting Hoar additional time to comply with discovery orders, a written opposition to Sara Lee's assertion of noncompliance, the magistrate's order of March 16, 1989 recommending that monetary sanctions be imposed jointly and severally on Hoar and Greenspan, written objections to that recommendation, a reply memorandum in support of those objections, and a final review by the district court. In view of these proceedings, we hold here, as we did in *Hoar I*, that "it stretches the imagination to argue that [Greenspan] did not have notice of, or the opportunity to be heard about, the sanction imposed." *Hoar I*, *supra*, 882 F.2d at 688.

We also reject Greenspan's contention that the district court failed to determine fault and allocate the Rule 37 sanctions accordingly. In holding Hoar and Greenspan *jointly and severally* liable for the monetary sanction, the district court (and the magistrate) determined that Hoar and its counsel were each equally responsible for the failure to comply with discovery requests and court orders. The record fully supports that determination.

(B)

In its reply brief, Greenspan contends—for the first time on appeal—that the failure to comply with discovery was "the fault of HOAR, and not the fault of counsel." Greenspan asserts that this claim was not raised in the lower court because of the law firm's ethical duties under the Canons of the Code of Professional Responsibility, which Greenspan concluded did not permit it to defend itself at the expense of the client. Greenspan claims that "[i]t was not until October 4, 1989 when [the firm] was served with the *sua sponte* complaint of the Ninth Judicial District Grievance Committee that [it was] given an opportunity to defend [its] conduct." We decline to consider this claim which is based principally upon factual allegations outside the record on appeal.

We generally will not consider claims that were not presented in the lower court. *E.g.*, *Rebaldo* v. *Cuomo*, 749 F.2d 133, 137 (2 Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985); *Schmidt* v. *Polish People's Republic*, 742 F.2d 67, 70 (2 Cir. 1984); *see also Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). "While this bar to raising new issues on appeal is not absolute, . . . it may

be overcome only when necessary to avoid manifest injustice." *Schmidt* v. *Polish People's Republic*, *supra*, 742 F.2d at 70 (citations omitted).

In view of the dehors the record factual nature of Greenspan's contention, we see no reason to depart from the general rule. We hold that that rule applies with particular force where a party seeks reversal of the district court's order for failure to hold a hearing on a claim of which the court had no notice.

Moreover, in affirming the court's order, we see no potential for manifest injustice. The record amply supports the imposition of monetary sanctions jointly and severally on Hoar and Greenspan. In its reply brief, Greenspan chronicles its growing frustration with Hoar's failure to supply information and documents needed for compliance with discovery requests. Indeed, Greenspan virtually concedes that those requests were not complied with, but blames Hoar for this failure. Even though Greenspan was aware (according to its reply brief) that Hoar was not fulfilling its discovery obligations, it implemented an obstructionist litigation strategy to persuade the lower court (and initially our Court) that there in fact had been full compliance. While we of course are mindful of an attorney's ethical duties under the Canons of the Code of Professional Responsibility, we emphatically reject Greenspan's contention that its vexatious and dilatory tactics were required by such duties.

(C)

For the same reasons as stated above, we decline to consider Greenspan's contention—raised for the first time on appeal—that the district court erred in imposing

sanctions without requiring "contemporaneous time records." *See New York State Assoc. for Retarded Children, Inc.* v. *Carey*, 711 F.2d 1136, 1148 (2 Cir. 1983) (applications for court-ordered attorneys' fees require documentation with contemporaneous time records). This contention should have been asserted in the district court to give Sara Lee the opportunity to submit time records to supplement its claim for attorneys' fees. By withholding its contention until this late stage in the litigation, Greenspan foreclosed that simple solution.

V.

To summarize:

We hold that Greenspan does not have standing to challenge the district court's order on the ground that the court failed to comply with a *de novo* standard of review. We also hold that the court properly exercised its discretion in imposing monetary sanctions jointly and severally upon Hoar and Greenspan. We further hold that due process requirements were satisfied since Greenspan had an opportunity to be heard as to the propriety of the Rule 37 sanctions. In reaching our decision, we decline to consider any claims not presented in the district court.

Affirmed.

APPENDIX C—ORDER OF UNITED STATES COURT OF APPEALS DENYING PETITION FOR RE-HEARING EN BANC DATED SEPTEMBER 21, 1989

United States Court of Appeals
for the
Second Circuit

/STAMP/
United States Court of Appeals, Second Circuit
Filed September 21, 1989
Elaine B. Goldsmith, Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of September, one thousand nine hundred and eighty-nine.

DOCKET NUMBER 88-7962

THOMAS E. HOAR, INCORPORATED,
Plaintiff-Appellant,
Cross-Appellee,

v.

SARA LEE CORPORATION, ET AL.,
Defendant-Appellee,
Cross-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant Thomas E. Hoar, Inc.

Appendix C

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/Elaine B. Goldsmith
Clerk

APPENDIX D—ARTICLE III, SECTION 1 OF THE UNITED STATES CONSTITUTION

ARTICLE III.—JUDICIAL POWER.

Section 1. Supreme Court and inferior courts—Judges and compensation

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

APPENDIX E—AMENDMENT 5 TO THE UNITED STATES CONSTITUTION

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F—28 U.S.C. 636

§ 636. JURISDICTION, POWERS, AND TEMPORARY ASSIGNMENT

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of person pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section, and

(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this

subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the Untied States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference

of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgement of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this

paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct, which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question

under this section an order requiring such personal to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such

functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 631.

APPENDIX G—RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorneys's fee.

APPENDIX H—Rule 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE

RULE 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive of Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or (31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment be default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under

paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) [Repealed. Pub.L. 96-481, Title II, § 205(a), Oct. 21, 1980, 94 Stat. 2330.]

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.